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No. 88-220

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

CHERYL ANN VIELLE,

Petitioner,

v.

WILLIAM JOSEPH BAISLEY,

Respondent.

BRIEF IN OPPOSITION TO PETITIONER FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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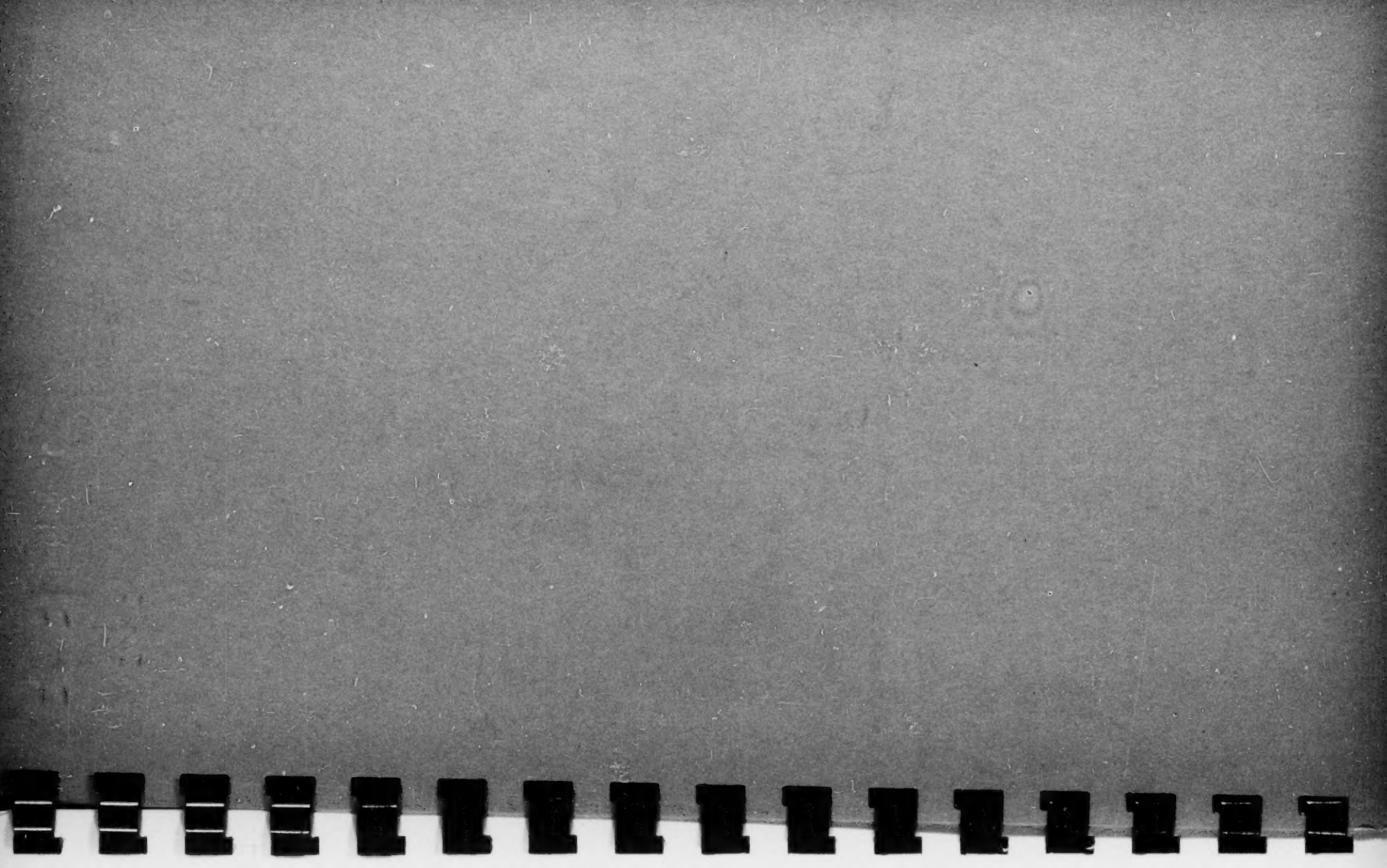

QUESTION PRESENTED

Respondent disputes the phrasing of the question by Petitioner. The question should be as follows: did the Colorado Court of Appeals err in affirming the Colorado District Court's exercise of jurisdiction of a dispute involving the custody of two non-Indian children born to an Indian mother and a non-Indian father, in which the parents had married off the reservation and had always resided off the reservation?

LIST OF PARTIES

Respondent has no dispute with Petitioner's list of parties.

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Respondent, William Joseph Baisley, respectfully prays that this Court deny Petitioner's Writ of Certiorari to review the judgment of the Colorado Court of Appeals entered on November 5, 1987. The Respondent has no corrections or additions to Petitioner's recitation of the procedural history and lower opinions in this case.

JURISDICTION

Respondent submits that 28 U.S.C. §1257(3) (1970) does not confer jurisdiction on this Court in that there are no rights or privileges conferred by any federal statute or regulatory scheme which are implicated by the Court of Appeals' decision. Further, pursuant to Supreme Court Rule 17, the Colorado Court of Appeals' decision is not in conflict with any Supreme Court decision in this area of law.

STATUTES INVOLVED

The Respondent has the following statutes to add to those included by Petitioner:

1. Indian Child Welfare Act, 25 U.S.C. §1901 et seq.

2. Colorado Uniform Child Custody Jurisdiction Act, C.R.S. §14-13-101 et seq.

3. Blackfeet Tribal Law and Order Code, Chapt. 3, §8:

> All members of the Blackfeet Indian Tribe shall hereafer be governed by state law and subject to state jurisdiction with respect to adoptions hereafter consummated.

STATEMENT OF THE CASE

Petitioner is bound by the trial court record in this case. "The Supreme Court cannot consider facts not brought to its notice by the record." Congress & Empire Spring Co. v. Knowlton, 103 U.S. 49, 26 L.Ed. 347 (1880). Yet the uncontradicted evidence in the record in this case fails to establish many of Petitioner's statements under her Statement of the Case. Given these misstatements and the importance of the facts misstated, i.e. that the parties' children are Indians, the Respondent has requested the Clerk of the Colorado Court of Appeals to certify the record to the Court.

In 1982, the parties began living together in Montana off the Blackfeet Reserva-

tion, thereby establishing a common law marriage under Montana law. Two sons were born to the parties, one in April, 1983 and one in May, 1984. Both births took place off the reservation and the parties never resided on the reservation during the time that they were together. The trial court record establishes that the Respondent and the children moved to Colorado, with the Petitioner's consent, in mid-July of 1985. On January 7, 1986, the Petitioner initiated a divorce action in Montana State Court. On January 21, 1986, the Respondent petitioned the Boulder, Colorado District Court to take jurisdiction over child custody under the Uniform Child Custody Jurisdiction Act, C.R.S. §14-13-101 et seq. (hereinafter "U.C.C.J.A.") On January 31, 1986, there was a telephone conference between the Montana and the Colorado judges concerning U.C.C.J.A. jurisdiction, which

resulted in the Colorado judge retaining jurisdiction over child custody. On April 30, 1986, the parties appeared in Boulder District Court for a temporary custody hearing and stipulated to joint custody pending the final custody hearing. The parties further stipulated that the father would have the children for the following six weeks and would be responsible for transporting the children to the Petitioner in mid-June, 1986 and that the Petitioner would have the children with her from mid-June, 1986 until the time of the custody hearing, July 28, 1986. The Petitioner was specifically ordered to bring the children to Boulder for the permanent custody hearing in July and she acquiesced in that order. The Respondent delivered the children to the Petitioner in mid-June, 1986. On July 15, 1986, Petitioner obtained an emergency protective custody order from the Blackfeet

Tribal Court. Prior to issuing the emergency order, the Blackfeet Tribal Judge gave no notice to the Respondent or to the Boulder District Court, and made no attempt to obtain a conference with the Colorado Court, despite knowing of the pending custody case in that court. On July 24, 1986, the Boulder District judge, having been informed informally of the Tribal Court order, attempted to reach the Tribal Court judge on the telephone, but failed to get through to the Tribal Court judge. On July 28, 1986, the Petitioner failed to appear for the permanent custody hearing and failed to produce the children as ordered. The Boulder District Court entered an order for sole permanent custody to the Respondent.

It is critical to the Court's consideration of this Writ to understand that the trial court judge had no evidence that the children

were enrolled members of the Blackfeet Tribe. In fact, the only evidence concerning enrollment in the trial court was from an Indian witness, Karen Whiteman, who testified that the Petitioner had told her that the children were not eligible for enrollment in the tribe because of lack of sufficient Blackfeet blood, and that the Petitioner intended to fraudulently c tain the childrens' enrollment. However, there was no evidence as to whether the enrollment had been obtained. Therefore, the trial judge had before him a case involving non-Indian children, a non-Indian father and all relevant actions occurring off the reservation. The only contact with the Blackfeet Tribe was that the mother was apparently an enrolled member of the Blackfeet Tribe.

Petitioner showed total disregard for the state court's jurisdiction and lawfully

entered orders by the following actions: voluntarily invoking state court jurisdiction in Montana, following through and obtaining a divorce decree from the Montana State Court, voluntarily appearing in the Colorado custody action, stipulating to a temporary visit with the children from mid-June to the end of July, 1986, stipulating to return the children to the Boulder District Court for the permanent custody hearing and then seeking refuge in the tribal court when she did not like the result of the proceedings in Montana and Colorado, shows her total disregard for the state court's jurisdiction and lawfully entered orders. The Petitioner had an opportunity to be heard, had notice of all proceedings, agreed to participate in the proceedings in Colorado, and then blatantly sought the protection of a third forum in an attempt to obtain the results she wanted.

REASONS FOR NOT GRANTING THE WRIT OF CERTORIARI

This case involves a non-Indian father, non-Indian children and a family who never lived on the reservation. The Blackfeet Tribal Court in this case has a very minor interest in the custody dispute between the parties. Conversely, the state courts have strong state interests in resolving the custody dispute involving four of its citizens in an action based on marriage, birth and residency which had occurred totally within state boundaries and off the Blackfeet Reservation. Given the lack of impact on the Tribe, there is no federal interest, right or policy affected by this case.

The Colorado Court of Appeals properly found that state courts have at least concurrent jurisdiction over divorce and custody matters on the facts of this case and that

given such state interests and the facts of the case, there was no preemption by federal law. This opinion by the Colorado Court of Appeals is in complete accordance with previous holdings of this Court and of lower federal courts concerning tribal court jurisdiction. There were no legal errors contained in the opinion of the Colorado Court of Appeals.

I. COLORADO PROPERLY TOOK JURISDICTION IN THIS CASE

A. Montana and Colorado State Courts have Jurisdiction over Divorce and Custody Matters Involving State Residents.

It cannot be denied that state courts have jurisdiction over residents of the state. There is a strong state interest in aiding in the resolution of disputes between its residents. This is true even for state residents who happen to be Indians, when they are living off the reservation.

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 149 (1973); Accord, Organized Village of Kake v. Egan, 369 U.S. 60 (1962). F. Cohen, Handbook of Federal Indian Law, p. 119 (1945).

In the area of divorce and custody proceedings, this Court has held that:

> The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the state and not to the laws of the United States.

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).

There is a marked lack of federal laws in the child custody area. In fact, in only one area of Indian domestic relations has Congress deemed it important to preempt the

states. The Indian Child Welfare Act, 25 U.S.C. §1901 et seq. establishes comprehensive standards for tribal versus state jurisdiction in dependency and neglect cases and cases involving termination of parental rights. The Act specifically exempts from its coverage child custody proceedings as part of divorce cases. 25 U.S.C. 1903(1). In so doing, Congress has clearly left to the states jurisdiction of private custody cases.

B. Federal Law Does not Preempt the Assertion of State Court Jurisdiction in this Case nor is Federal Preemption Analysis even Applicable to the Facts of this Case.

Petitioner bases her preemption argument on federal policy as expressed in the Indian Civil Rights Act, 25 U.S.C. §1322 (1982) and its predecessor Public Law 280 (Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588). Neither Act applies to this case; preemption analysis is therefore irrelevant.

The Indian Civil Rights Act, 25 U.S.C. §1322 (1982) provides that the state may, with the consent of the tribe, assume jurisdiction over civil matters "which arise in the areas of Indian country situated within such state". 25 U.S.C. §1322 (1982). Thus, clearly, that on its face, the Act does not apply to causes of action which arise beyond the boundaries of the reservation. In Section 1322(a) of the Act, the language in part is as follows:

> The consent of the United States is hereby given to any state not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such state. . . (Emphasis added)

The Act addresses lack of state court jurisdiction over actions involving two Indians, or an action in which an Indian was a party which arose in the area of Indian country. Neither

of these facts are present in this case. Also, §1326 of the Act provides that state jurisdiction pursuant to this title shall be applicable in Indian country where the Indians have accepted such jurisdiction in accordance with the Act. Again, Respondent stresses the fact that the marriage between the parties took place off the reservation, the children were born off the reservation and never lived there until they were allowed to go there by a Colorado district court order. The parties and children never resided on the reservation during the marriage. The parties' divorce and custody action was filed by Petitioner in state court. There is absolutely no cause of action in this case which arose in Indian country. Further, the fact that the Respondent is not a member of the tribe who has no connections with Indian country mitigates

against any application of the Civil Rights Act.

Montana's divorce and custody code predated and survived the passage of Public Law 280, supra and the Indian Civil Rights Act. State ex rel. Ironbear v. District Court, 512 P.2d 1291 (Mont. 1973). In Ironbear, the Montana Supreme Court decided, after applying the infringement test set forth in Williams v. Lee, 358 U.S. 217 (1959) to apply state divorce law in state court to Indian parties living on the reservation. The court found no exclusive control by the United States nor any interference with tribal self-government. Under the Ironbear analysis, Public Law 280 and the Indian Civil Rights Act are not even applicable to this case.

Petitioner argues that the Tribal Code's grant of jurisdiction to the state court is insufficient in light of Kennerly v. District

Court of Montana, supra. Respondent is not arguing that these Tribal Code sections comply with the consent to jurisdiction requirement of either Public Law 280 or 28 U.S.C. 1322. Rather, Respondent argues that these Code provisions do not even apply to state exercise of jurisdiction in this case.

Petitioner cites no other federal policy, statute or regulatory scheme in support of her preemption argument, but asserts, incorrectly, that she need not present an express congressional statement of intent upon which to predicate preemption. She improperly cites California v. Cabazon Board of Indians, 107 S.Ct. 1083 (1987) and Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986) for this proposition. In fact, those cases hold that some federal law or regulatory scheme is vital to preemption analysis.

Cabazon, supra clearly states that there is no inflexible per se rule precluding state court jurisdiction over tribes and their members in the absence of an express congressional grant. Petitioner's reliance on vague sovereignty language is outdated. In McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), this Court stated:

> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. (Citing Mescalero Apache Tribe v. Jones, 411 U.S. 145). The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. Compare, e.g., United States v. Kagama, 118 U.S. 375, 6 S. Ct. 1109, 30 L.Ed. 228 (1886), with Kennerly v. District Court, 400 U.S. 423, 90 S.Ct. 480, 27 L.Ed.2d 507 (1971).

It is clear that the language of the Indian Civil Rights Act itself is not applicable to the case at bar and there is no other federal policy in place which would recognize exclusive Indian jurisdiction based on self-determination or sovereignty in a case involving a non-Indian defendant in actions that occurred off the reservation.

Petitioner also relies on the importance of tribal court jurisdiction as part of her preemption argument. However, the facts of this case all undermine such reliance. Every relevant action occurred off the reservation: the parties' marriage, the birth of their children, their residency during the marriage, and their divorce. The only action which occurred on the reservation was the Petitioner's temporary visit with the children for one month prior to the filing of her Tribal Court action. Petitioner cannot be allowed to argue

that the domicile of the children was on the reservation. The most Petitioner can properly argue is that the children were physically present on the reservation on a grant from the Colorado court at the time of her filing.

Five of the preemption cases cited by Petitioner actually contradict her position: they all turned on the fact that all relevant actions occurred on the reservation, not off of it. The remaining cases cited by her, the state taxation cases, are inopposite. Fisher v. District Court, 424 U.S. 382 (1976) (domestic relations matter, both parties were members of the Crow Tribe, the dispute arose on the reservation, and no important facts had occurred off the reservation); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (tribe's taxation of Indian mining activities on the reservation); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985);

R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979 (9th Cir. 1983); and Iowa Mutual Ins. Co. v. LaPlante, 107 S.Ct. 971 (1987) (transactions occurring solely on the reservation).

The remaining cases Petitioner cites to support her preemption argument dealt with issues of state taxation over a non-Indian doing business on a reservation in Arizona. In White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) the non-Indian was asserting sovereignty to try to bar state taxation resulting from its business relationship within the tribe. It was held that the state tax was invalid. The court reasoned that the state's generalized interest in raising revenue in this case was insufficient to permit intrusion into the federal regulatory scheme. In McClanahan v. Arizona State Tax Commission, supra the narrow question was if

the state may tax a reservation Indian for income earned exclusively on the reservation. It was held that by the state imposing the tax in question the state interfered with matters which relevant treaty and statute left to regulation by the federal government. McClanahan at 165, 168. State taxation preemption cases cannot be used as a precedent to support preemption in this case. State taxation and regulation of Indian land has consistently held to be preempted by federal law. Unlike the power to tax which is inherent in sovereignty, state jurisdiction to decide the custody of children whose parents are both Indian and non-Indian is not one which will interfere with tribal sovereignty.

Petitioner has cited no case in support of tribal court jurisdiction involving facts similar to this case. In fact, there are many decisions of this Court which support the

decision of the Colorado Court of Appeals. In Williams v. Lee, supra the Court described the history of federal protection of tribal jurisdiction. The Court stated:

> Over the years this court has modified these principals in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. . . . Thus suits by Indians against outsiders in state courts have been sanctioned.

In Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984), this Court held that state jurisdiction over non-Indian claims against Indians was an impermissible intrusion on self-government but that state jurisdiction over the claims of an Indian plaintiff against a non-Indian defendant was lawful since there was no interference with the right of tribal Indians to govern themselves.

This Court's decisions in Williams v.

Lee, supra; Three Affiliated Tribes v. Wold Engineering, supra; and Mescalero, supra all make it clear that the Court does not consider the interests of the Indian Tribal Court sufficient to give it exclusive jurisdiction in a case such as the one at bar. Petitioner's arguments simply confuse this Court's decisions in different areas of Indian law. This would be a far different case if it involved two Indian parties, facts which occurred on the reservation or an area of law in which Congress has undertaken regulation or statutory preemption. In the absence of those facts, Petitioner's arguments are not relevant.

C. The Infringement Test, if Applicable, Would Allow the State Court's Exercise of Jurisdiction.

As Respondent has established, preemption analysis is not applicable in this case. The next level of analysis is the

"infringement test" first enunciated by the Supreme Court in Williams v. Lee, supra which Petitioner has chosen to ignore.

In Williams the issue was whether a non-Indian trader who operated a store on the reservation could bring an action in state court to collect a bill owed him by Indians who lived on the reservation and who had purchased goods on credit. This Court set forth the infringement test as follows:

> Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

Williams at p. 220. On those facts, the Williams Court found that state court jurisdiction would undermine the authority of the tribal court. The court relied heavily on the fact that the Navahoes had a functioning court system which could handle the controversy.

The Williams infringement test has been limited primarily to attempted exercises of jurisdiction over non-Indians. Indeed, the facts in the present case all point toward the minimal tribal interest and the substantial state interest in the controversy. McClanahan v. Arizona State Tax Commission, supra makes it clear that the infringement test should be used in cases involving a non-Indian defendant in which all of the relevant transactions occurred outside the reservation in that in these situations both the tribe and state could fairly claim an interest in asserting their respective jurisdictions. McClanahan at 129.

In this case, the state is merely providing a forum for the non-Indian defendant and the Indian plaintiff. There is no interference with tribal self-government

because the tribe has no governmental interest in protecting non-Indian defendants.

> Where the parties are Indian and non-Indian and the transaction occurred off the reservation, the interest of the tribe in adjudicating the matter would necessarily be small and the possibility of interference with tribal self-government negligible.

F. Cohen, Handbook of Federal Indian Law, pages 94-98 (1945).

II. THE COLORADO COURT OF APPEALS CORRECTLY INTERPRETED THE BLACKFEET TRIBAL CODE IN ITS JURISDICTIONAL ANALYSIS

The Blackfeet Code does not specifically address the matter of child custody proceedings. Where the Code does deal with the issue of domestic relations such as marriage and adoption, it specifically grants state courts jurisdiction. Chapter 3, Sec. 1 of the Code provides that all members of the Blackfeet Indian Tribe shall hereafter be governed by

state law and subject to state jurisdiction with respect to marriages. It also provides that common law marriages will not be recognized. Chapter 3, Sec. 8 of the Code provides that all members of the Blackfeet Indian Tribe shall hereafter be governed by state law and subject to state jurisdiction with respect to adoptions hereafter consummated. Chapter 2, Sec. 1 of the Tribal Code grants concurrent civil jurisdiction to state courts when the defendant is a member of the tribe. Although this section does not have direct application to this case, it indirectly suggests that the Blackfeet Tribe wish to obtain some ability to protect its members who are brought into court by a non-Indian plaintiff. Because this section of the Code only mentions Indian defendants in civil matters, it acknowledges the fact that an Indian court does not have

jurisdiction over a non-Indian defendant in matters not connected with the reservation.

Further, the fact that the Code does not even recognize common law marriages coupled with the fact that the parties established their marriage through Montana common law, means that parties could not have filed the divorce action in the Tribal Court. In the absence of a remedy in the Tribal Court, state courts would have to provide a forum to the parties to resolve their case. See, Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986); William v. Lee, supra.

The Colorado Court of Appeals relied on United States ex rel. Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974). In Cobell, the Court held that the Blackfeet Code of Montana gave jurisdiction over divorce and related custody matters to the state courts in cases

involving Indian parties. The Colorado court properly relied on the Cobell case, in that it is directly on point on this issue and it has not been overturned. In fact it has been cited and relied on by many later cases. Petitioner argues that Cobell is no longer good law in that it ignores the decisions of this Court in Kennerly, supra; Merrion v. Jicarilla Apache Tribe, supra and R.J. Williams Co. v. Fort Belknap Housing Authority, supra. The language which Petitioner takes from those cases in order to urge this Court to overturn the Cobell decision is general in nature, and does not represent holdings of those cases. As discussed previously, each of those cases involved transactions which occurred solely on the Indian reservations, and such facts were central to the Court's reasoning in the cases.

CONCLUSION

The opinion of the Colorado Court of Appeals is in full accord with numerous opinions of this Court on the proper exercise of state court jurisdiction in cases involving non-Indian defendants in transactions occurring off the reservation. For that reason, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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